JAN 13 1995

No. 94-1125

In The

Supreme Court of the United States

October Term, 1994

ELOISE McGEE,

Petitioner,

v.

HOLMES COUNTY, MISSISSIPPI,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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January 13, 1995

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QUESTION PRESENTED

1. Whether a Mississippi county may be held liable for a judicial decision of a Justice Court Judge under 42 U.S.C. § 1983?

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FEDERAL STATUTE INVOLVED

The petitioner claims that the federal statute involved is 42 U.S.C. § 1983. This statute is quoted in petitioner's petition for writ of certiorari which was filed with this Court on December 19, 1994. The respondent's position is that the petitioner has not been deprived of any rights, privileges, or immunities secured by the Constitution and laws of the State of Mississippi or the United States as prescribed by said statute. Alternatively, assuming *arguendo* that such deprivation occurred, respondent was not responsible therefor. Therefore,

respondent is not liable to the petitioner under 42 U.S.C. § 1983, or otherwise.

STATEMENT OF THE CASE

Eloise McGee filed a lawsuit against Holmes County, Mississippi, and a Mississippi Department of Human Services employee, claiming civil rights violations under 42 U.S.C. § 1983. Mrs. McGee voluntarily dismissed the Mississippi Department of Human Services employee.

The petitioner was arrested on December 4, 1991, under a warrant issued by Judge Shirley Neal, a Holmes County Justice Court Judge. Holmes County prosecutor, Hon. Buren T. Batson, instituted criminal charges of child abuse against Eloise McGee and her husband, Gregory McGee, in the Justice Court of Holmes County, Mississippi, after a report had been made to him by Katherine Foster of the Mississippi Department of Human Services. Mrs. Foster's report was based on information obtained from the McGee children after they requested a meeting with her. Gregory and Eloise McGee were arrested and charged with five counts of felony child abuse on December 4, 1991. At that time, Mr. McGee and Mrs. McGee received Court-appointed attorneys. Thereafter, the McGees were brought before the Justice Court Judge for a preliminary hearing, where sufficient evidence was presented before Judge Neal to bind them over to the Holmes County Grand Jury, with bond being set for Eloise McGee at $1,000.00, and bond for Gregory McGee being set at $50,000.00.

Mr. McGee was tried in the Circuit Court of Holmes County, Mississippi, and was acquitted. Eloise McGee never stood trial on the four indictments, which were ultimately dismissed by the State of Mississippi.

At no time did Mrs. McGee or her attorney file a *habeas corpus* petition, request a reduction in bond or request a hearing to reduce bond.

The complaint against Holmes County, Mississippi, was filed on February 5, 1993. Thereafter, Eloise McGee sought to amend her complaint but the motion to amend was denied by U. S. Magistrate Judge, the Honorable John R. Countiss, III, and the case was dismissed following *Johnson v. Moore*, 952 F.2d 92 (5th Cir. 1992). United States District Court Judge Tom S. Lee reviewed Judge Countiss' order and dismissed the suit, following *Johnson*. The United States Court of Appeals for the Fifth Circuit affirmed Judge Lee's decision based on a multitude of cases including *Johnson, supra, Pembaur v. Cincinnati*, 475 U.S. 469, 106 S. Ct. 1292, 89 L. Ed. 2d 452 (1986), and *Benevides v. County of Wilson*, 955 F.2d 958 (5th Cir. 1992), cert. denied, 113 S. Ct. 79, 121 L. Ed. 2d 43 (1992).

REASONS FOR DENYING THE WRIT

The United States Supreme Court should not review this case since the Fifth Circuit's holding in *Johnson, supra*, is consistent with this Court's prior decisions.

The petitioner's argument is hardly worthy of a rebuttal. However, since there are numerous misstatements of fact and law, the respondent is compelled to tell the real story.

Eloise McGee, being charged with five separate counts of felony child abuse,[1] was initially held in the Holmes County Jail for fourteen days under a $50,000.00 bond, which amount represents $10,000.00 per count. The Justice Court Judge set the bond at the instant the warrant was signed. Immediately after Mrs. McGee's arrest, she was appointed an attorney, the Honorable Jannie Lewis, to represent her. At no time did Mrs. McGee or her attorney request a bond reduction or institute a *habeas corpus* proceeding, which would have been heard immediately by the Justice Court Judge.[2] Instead, Mrs. McGee stayed in jail until her preliminary hearing, at which time the Justice Court Judge of Holmes County, Mississippi, decided that enough evidence had been presented to bind Mrs. McGee and her husband over to the Holmes County Grand Jury. Mrs. McGee and her husband were later indicted by the Holmes County Grand Jury. The McGees' cases were severed at the instance of their counsel, and Mr. McGee's case was brought to trial first. Mr. McGee was acquitted and therefore Mrs. McGee was never tried.

Mississippi law provides that any Justice Court Judge, Municipal Judge, County Court Judge or Circuit

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[1] Miss. Code Ann. § 97-5-39(2) (1972).

[2] In *Stack v. Boyle*, 342 U.S. 1, 72 S. Ct. 1, 96 L. Ed. 3 (1951), the defendants exercised their right for reduction of bail by motion and filed writs of *habeas corpus*. The petitioner here did not invoke these rights and privileges.

Court Judge can set bail. Miss. Code Ann. § 99-5-11 (1972).

The petitioner is correct in saying that the Justice Court Judge cannot individually be sued for his judicial acts. *Mireles v. Waco,* 502 U.S. 1, 112 S. Ct. 286, 116 L. Ed. 2d 9 (1991). Clearly, a county cannot be held liable for the acts of a non-policy making employee under a theory of *respondeat superior. Benevides v. County of Wilson, supra; Carbalan v. Vaughan,* 760 F.2d 662 (5th Cir. 1985), cert. denied, 474 U.S. 1007, 106 S. Ct. 529, 88 L. Ed. 2d 461.

This Court has repeatedly held that § 1983 liability cannot be imposed on a governmental entity under a theory of *respondeat superior. Monell v. Department of Social Services,* 436 U.S. 658, 690-694, 98 S. Ct. 2018, 2335-2337, 56 L. Ed. 2d 611 (1978).

A clear reading of *Johnson v. Moore, supra,* shows that it is compatible with *Pembaur.* In fact, in *Bigford v. Taylor,* 834 F.2d 1213 (5th Cir. 1988), cert. denied, 488 U.S. 851, 109 S. Ct. 135, 1026 L. Ed. 2d 108, the Fifth Circuit Court of Appeals, relying on *Pembaur,* stated as follows:

> A Texas County Judge may possess such policy making authority in some matters. . . . However, (Judge Buckner) was not the Galveston County Judge, but a Justice of the Peace for one precinct of the county. His job is to adjudicate various small claims. . . . and it does not involve any of the policy making functions of the county judge.

Id. at 1222.

The same can be said for Judge Neal. He is a Justice Court Judge, which is a form of magistrate. His duties are to adjudicate claims under $1,000.00, to hear misdemeanor criminal matters (those constituting imprisonment up to one year) and to set bond for those persons charged by affidavits with crimes and offenses.

Mrs. McGee asks this Court to read *Pembaur* to support her argument that a Justice Court Judge is a final policy maker for Holmes County, and that his actions constitute official policy. That argument is meritless. A Justice Court Judge exercising his or her judicial discretion does not make official county policy, but merely uses the discretion provided to him or her by the laws and statutes of the State of Mississippi. *Id.* at 1222.

Furthermore, the Mississippi Legislature enacted a statute to prohibit such suits against governmental entities. Mississippi Code Annotated, § 11-46-9 (1972) states in part:

> "A governmental entity[3] and its employees acting within the course and scope of their employment or duties shall not be liable for any claim:
>
> (a) arising out of a legislative or judicial action or inaction, or administrative action or inaction of a legislative or judicial nature; . . . "

Therefore, under existing State law, Holmes County is not liable for the acts or omissions of a judicial nature.

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[3] The term includes state and political subdivisions like Holmes County.

To grant this petition in this case would send a clear signal to trial judges that their judicial acts, even those of a discretionary nature, could bind a political subdivision in every situation. The result would be to open a "Pandora's Box" of litigation against municipalities, counties and states every time a judge makes a decision. Surely, that is not what 42 U.S.C. § 1983 was meant to do.

CONCLUSION

For the foregoing reasons, and based on the authorities cited, the petition for writ of certiorari should be denied.

Respectfully submitted,

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